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No. _____

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1992

ROGER A. PETERSON,

Petitioner,

vs.

R. H. STAFFORD,
THE WASHINGTON COUNTY AUDITOR,

Respondent,

and

JOAN ANDERSON GROWE, SECRETARY OF STATE
OF THE STATE OF MINNESOTA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

BRIEF OF MINNESOTA CIVIL LIBERTIES UNION FOUNDATION AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

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CONSENT OF PARTIES

All parties to this case have consented in writing to the filing of this brief of Amicus Curiae, the Minnesota Civil Liberties Union. Their letters of consent accompany this brief pursuant to the Supreme Court Rule 37.2.

INTEREST OF THE AMICUS CURIAE

The Minnesota Civil Liberties Union (MCLU) is a private, non-profit, non-partisan, membership supported organization having more than 6,500 members in the state of Minnesota. The MCLU is a state-wide affiliate of the American Civil Liberties Union. Its purpose is the protection of the rights and liberties preserved by the Minnesota

and United States Constitutions. Among these rights is the fundamental right to vote free from unconstitutional state infringement. The MCLU has been active in defence of this right against laws that diminish the right to fair and impartial elections.

SUMMARY OF ARGUMENT

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." Westberry v. Sanders, 376 U.S. 1, 17 (1964). Because of their central role in interpreting and applying the laws, the individuals who sit on the courts are an integral part of our republican form of government. Where the

method of selection of the highest judicial officers is by popular election, as in Minnesota, that same "precious" right is the prerequisite of democracy. Voting rights are "preservative of other basic civil and political rights." Reynolds v. Sims, 377 U.S. 533, 562 (1964).

The constitutional right to be protected is that of "likeminded voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters to express their own political preferences." Norman v. Reed, 502 U.S.___,___, 116 L.Ed.2d 711, 723 (1992)(citations omitted). In order for this right of access to be meaningful, infringements on the right require the "demonstration of a corresponding interest sufficiently weighty to justify the limitation, Id., and, "any severe

restriction [is] to be narrowly drawn to advance a state interest of compelling importance." Id. This follows the long tradition of our constitutional jurisprudence requiring strict scrutiny in cases involving one of the basic civil rights of humanity. Skinner v. State of Oklahoma, 316 U.S. 535 (1942).

The State of Minnesota has a unique election scheme for justices of its supreme court. For example, in this case where Associate Justice Gardebring was vying against the challenge of Petitioner Roger A. Peterson, the ballot read:

JUDICIAL OFFICES

ASSOCIATE JUSTICE
SUPREME COURT
(GARDEBRING SEAT)
(VOTE FOR ONE)

SANDRA GARDEBRING
INCUMBENT

ROGER A. PETERSON

The statute which mandates this

format is Minn. Stat. § 204B.36, subds. 4 and 5. They read as follows:

> The official ballot shall contain the names of all candidates for each judicial office and shall state the number of those candidates for whom a voter may vote. The title of each judicial office shall be printed on the official primary and general election ballot as follows: (a) In the case of the supreme court: "Chief justice (or associate justice) - supreme court (last name of incumbent) seat."

Minn. Stat. Sec. 204B.36, subd. 4.

> If a chief justice, associate justice or judge is a candidate to succeed again, the word "incumbent" shall be printed after that judge's name as a candidate.

Minn. Stat. Sec. 204B.36, subd. 5.

The Minnesota Court has applied "something akin to the rational basis test". Peterson v. Stafford, 490 N.W.2d at 423. This is the wrong standard both based on precedent in this Court[1] and on

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[1] *See, for example,* Anderson v. Celebrezze, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) and Norman v. Reed, 560 U.S. ___, 112 S.Ct ___, 116 L.Ed.2d 711, 723 (1992).

a basic constitutional tenant, that although in our federal system states retain the power to regulate their own elections, that power is not absolute.[2]

The current Minnesota scheme is more historical accident than a result of the legislature's reasoning. In 1949, Minnesota began designating the incumbent in judicial elections. Peterson v.

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[2]Minnesota need not opt for an elected judiciary, but could appoint the members or possibly even draw lots for the seats. The fact that Minnesota has selected judicial elections guarantees them the due process of the laws in the manner in which those elections are held, as well as the equal protection and associational voting rights established by the federal constitution. When they opted for the democratic process, the United States Constitutional requires that no voter by treated favorably at the expense of other voters. See, eg. Baker V. Carr, 369 U.S. 186 (1962) and Reynolds v. Sims, 377 U.S. 533 (1964).

Allowing slanting of elections by manifestly unfair ballot manipulation would destroy apportionment guarantees established by Baker and Reynolds.

Stafford, 490 N.W.2d at 423. In an attempt to merge the benefits of retention-type ballots of other states with the public's right to "retain ultimate control of the judiciary," "[t]he legislature considered it appropriate for the ballot to inform the voters which candidate was seeking retention." Id. Historical accident, this Court has stated, may be an explanation, but it is not a justification. Norman v. Reed, 116 L.Ed.2d at 726-27 Note 10 (citations omitted).

The Minnesota Supreme Court has acknowledged that the statutory provisions in question may have a discriminatory impact on voters supporting non-incumbents. Gustafson v. Holm, 232 Minn. 118, 128, 44 N.W.2d 443,

___ (1950).[3] This advantage to an incumbent's supporters results in a benefit to that justice: An appearance of state endorsement. At least one federal court has been upheld by a circuit court when it found as a matter of fact that even the listing of incumbents first without any other identifications, amounted to "an advantage of at least five (5) percent." McLain v. Meier, 637 F.2d 1159, 1166

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[3]"Even though the candidate indirectly may derive some benefit from such identification...." Gustafson v. Holm, 232 Minn. 118, 128, 44 N.W..2d 443 (1950). And "[T]his designation may provide the incumbent with an advantage over other candidates...." Peterson v. Stafford, 490 N.W.2d 418, 423 (1992). "Whatever advantage there may be to the incumbent from the incumbency designation on the ballot...." Id., at 424. "'The fact that some statistical advantage may at the same time accrue to one of the candidates by virtue of his or her incumbency....'" Id., *quoting* Clough v. Guzzi, 416 F.Supp. 1057, 1068 (D.Mass. 1976).

(1980).[4]

It also appears to be the *intent* of the Minnesota legislation to implement a "retention-plan", yet have it masquerade as a popular election. Had Minnesota opted for a retention election, the voters would at least know that the

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[4]*See also,* the following cases cited in McLain, 637 F.2d at 1166-67: Weisberg v. Powell, 417 F.2d 388, 392-93 (7th Cir. 1969); Culliton v. Bd. of Election Comm'rs of the County of DuPage, 419 F.Supp. 126 (N.D.Ill. 1976), *aff'd in part and remanded in part sub nom. Sangmeister v. Woodard,* 565 F.2d 460 (7th Cir. 1977), *cert. denied and app. dismissed sub nom. Illinois State Bd. of Elections v. Sangmeister,* 435 U.S. 939, 98 S.Ct. 1516, 55 L.Ed.2d 535 (1978); Gould v. Grubb, 14 Cal.3d 661, 122 Cal.Rptr. 377, 536 P.2d 1337 (1975); Holtsman v. Power, 313 N.Y.S.2d 904, 62 Misc.2d 1020, *aff'd mem.*, 34 App. Div.2d 917, 311 N.Y.S.2d 824, *aff'd mem.*, 27 N.Y.2d 628, 313 N.Y.S.2d 760, 261 N.E.2d 666 (1970); Kautenburger v. Jackson, 85 Ariz. 128, 333 P.2d 293 (1958); Elliot v. Secretary of State, 295 Mich. 245, 294 N.W. 171 (1940).

election is for retention.[5] Current "elections" are a confusing hybrid with none of the advantages of open elections or retention systems. An open election would fairly offer the candidates to voters. A retention election would allow evaluation by voters of the incumbent's performance in office, followed if necessary by a fair and open election or the political process of appointment. The judicial election process is of profound importance in Minnesota, where governors appoint judges without the "Advice and Consent" of a legislative body, as required by the United States Constitution. While Minnesota describes its scheme as merely "its own variation of the election process", Id., that

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[5]The Minnesota constitution requires an "open election" for judges. Peterson v. Stafford, 490 N.W.2d at 424.

"variation" deviates from minimum guarantees of the first and fourteenth amendments.

The intent to discriminate is further evident in the Minnesota Supreme Court's acknowledgement that the incumbency designation is a means of persuading the voters by listing it as a "qualification for candidacy." Id.,at 425. Minnesota judicial elections were made non-partisan in 1912 to avoid having party endorsements presented at the polling booth as qualifications. Id., at 422. Now there is only one endorsement for judicial office in Minnesota and that is for the incumbent, who's name is presented on the ballot in a manner that implies the incumbent candidate has the endorsement of the state.

This "comprehensive elective scheme,"Id., developed through

"distinctive legislative treatment" Id., at 423, has largely succeeded in depriving Minnesotans of a meaningful choice at the polling place when an incumbent judge is seeking re-election.

ARGUMENT

A presumption of validity generally favors legislation governing the structure of elections under circumstances where the fundamental right is not unduly burdened. This is because, under ordinary circumstances, election processes are "necessarily structured to maintain the integrity of the democratic system." Anderson v. Celebrezze, 460 U.S. 780, 788 (1985).[6] However, a

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[6]It has now become well established that election questions may be justiciable. See, eg. Baker v. Carr, 369 U.S. 186 (1962). But, the deference given

stricter scrutiny is applied to discriminatory burdens on the fundamental right:

> [A court] must consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the state as justifications for the burdens imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it must also consider this extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all of these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).[7]

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legislated procedural election controls implicitly recognizes that non-substantial interference with voting rights is but narrowly distinguishable from the political question.

5. The Seventh Circuit has articulated a standard of review for such ballot manipulation to fail judicial scrutiny if there is a showing of "intentional or

There is an inherent difficulty where a court, without review by any authority, examines the validity of its own justices' election against the standards of the United States Constitution. No state interests exists to justify the magnitude of the injury to

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purposeful discrimination by authorities" and actual harm to candidates. Bd. of Election Comm'rs v. Libertarian Party of Illinois, 591 F.2d 22, 24-25 (7th Cir), *cert. denied,* 442 U.S. 918, 99 S.Ct. 2840, 61 L.Ed.2d 285 (1979), *citing* Bohus v. Bd. of Election Comm'rs, 447 F.2d 821 (7th Cir. 1971) *and* Sangmeister v. Woodward, 565 F.2d 465 (7th Cir. 1977), *cert. denied and app. dismissed sub nom.* Illinois State Bd. of Elections v. Sangmeister, 435 U.S. 939, 98 S.Ct. 1516, 55 L.Ed.2d 535 (1978).

The intent element of this standard is satisfied both by clear inference from the foreseeable result of the combination of ballot position preference and the double designation as well as the Minnesota supreme court's prolonged discussion of, and reference to, the (unauthorized) advantages of retention elections. It is likely that the so-called "Missouri Plan" elections were never enacted in Minnesota because the citizens of Minnesota desired open elections.

voters' rights protected by the First and Fourteenth Amendments.

The remainder of this brief further illustrates the substantial nature of the burden on the fundamental rights of voters and candidates imposed by the Minnesota statute.

THE MINNESOTA INCUMBENCY DESIGNATIONS FOR ELECTIONS TO THE STATE SUPREME COURT VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION.

Incumbency designations are not utilized in elections for any non-judicial offices in Minnesota. In fact, the Minnesota legislature has explicitly recognized that "incumbency first" ballots give an unfair advantage to candidates in the top position. Minn.

Stat. Sec.204D.08, subd. 3(1992).[8] The Minnesota Supreme Court tacitly acknowledges the unfairness of the incumbency designations when it states that "whatever advantage there may be to the incumbent from the incumbency designation on the ballot, [the advantages are justified by the statute's interest in a] able, independent and stable judiciary". Peterson v. Stafford, 490 N.W.2d at 424.

The purpose of the statute, however, appears to be one more of entrenchment

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[8]Minn. Stat. Sec. 204D.08, subd. 3 (1992) requires rotating the names of the candidates on the ballot. No such remedial legislation acts to compensate for the effects of the incumbency designations or the denomination of the office as the justice's "seat" at the top of the ballot. See also, Gould v. Grubb, 536 P.2d 1337 (Calif. 1975)(incumbent first ballots violate the United States Constitution) and McLain v. Meier, 637 F.2d 1159 (8th Cir. 1980)(incumbent party members in first column held unconstitutional).

and protectionism than the Minnesota Supreme Court acknowledges. This is evidenced by the Minnesota Supreme Court's statement that incumbency is a qualification relevant to judicial elections, Peterson v. Stafford, 490 N.W.2d at 425, and yet the Minnesota scheme provides no method for non-incumbents to list any of their qualifications on the ballot. The clear inference from the state's awareness of the unfair impact of the statute is an intent to endorse incumbent candidates with all the influence of the state, in the privacy of the polling place. This is discrimination and it limits political association without showing a compelling state interest.

In direct conflict with the constitutional interpretation of the Minnesota Supreme Court is the California

Supreme Court's declaration that no rational basis can exist for placing incumbents first on the ballot. Gould v. Grubb, 536 P.2d 1337 (Calif. 1975). The Gould court stated, "... the challenged provision effectively undermines the fundamental democratic election tenet of majority rule." Gould v. Grubb, 536 P.2d at 1343 (citations omitted).[9]

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[9]While courts such as McLain v. Meier and Gould v. Grubb have held incumbent designations and ballot placement advantages unconstitutional, this Court once affirmed a more limited incumbency designation alone in Binkowski v. Miller, 411 U.S. 901 (1973) (summary disposition).

Binkowski is, of course, because of its summary disposition, not precedent. Even the issue of incumbency designations alone has apparently not been fully briefed to this Court. In the instant case, there is also the combined effect of incumbency designations, listing first on each ballot the name of the incumbent, naming the "seat" for the incumbent, and using the incumbent's name twice on each ballot and the challenger's name just once. Further, Binkowski's incumbency designations were authorized by the Michigan constitution; the Minnesota constitution makes no such provision.

Similarly, the Arizona Supreme Court has found that even an alphabetical listing provides an unconstitutional advantage to the candidate appearing first on the ballot. Kautenburger v. Jackson, 85 Ariz. 128, 333 P.2d 293 (Az. 1958). By reaffirming the 1950 Gustafson decision, the Minnesota Supreme Court has found rationality where other states and federal courts could not.[10] Because of the conflicting holdings of circuit courts of appeal and state supreme courts

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This case provides the Court with a better opportunity to delineate the standards for this most vital of all areas of law in a democracy than did the 1973 Rinkowski case.

[10] McLain v. Meier, 637 F.2d 1159 (8th Cir. 1980), Netsch v. Lewis, 344 F.Supp. 1280 (N.D.Ill. 1972), and Holtzman v. Power, 313 N.Y.S. 2d 904, 62 Misc.2d 1029, *aff'd mem.*, 34 App.Div.2d 628, 313 N.Y.S.2d 760, 261 N.E.2d 666 (1970).

Rule 10.1 (a) of this Court is applicable.

regarding incumbency first/incumbency endorsement ballots, guidance from this Court on the parameters of constitutional guarantees requires articulation.

DESIGNATION BY ENTITLEMENT OF THE JUDICIAL OFFICE OF CHIEF JUSTICE OR ASSOCIATE JUSTICE ON THE BALLOT AS THE "SEAT" OF THE INCUMBENT VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Assuming *arguendo* that the "stable" judiciary desired by those holding power in Minnesota may be achieved without offending the constitution by use of the incumbency designation, it is nevertheless made excessively, and unconstitutionally, "stable" by labeling the office with the name of the office holder.

This double advantage to the incumbent substantially interferes with voters' abilities to elect non-

incumbents. The Minnesota Supreme Court has implicitly recognized as much by stating that, "In assisting voters to cast their votes intelligently for offices unfamiliar to the average voter, it is only a matter of fairness that he be advised who the present judge is." Peterson v. Stafford, 490 N.W.2d at 423-24 *quoting* Gustafson v. Holm, 232 Minn. at 1265-27, 44 N.W.2d at 447. When offices are "unfamiliar to the average voter," there is no doubt further confusion of the electorates attendant to the double designation. If the *average* voter is unfamiliar with the judiciary and requires an incumbency designation, how much more unfamiliar the marginal voter must be; and it is the marginal voter who may make the difference in a

close election.[11] The Minnesota Supreme Court has as much as admitted that the elections are not even.[12]

The intention and effect of the Statute's disparate treatment is obviously to perpetuate incumbents and discriminate against voters supporting challengers. Exacerbating polling place confusion can only inure to the benefit of the incumbent.[13]

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[11]This effect has been noted by, among others, the Eighth Circuit as it applied to incumbent-first ballots in North Dakota. McLain v. Meier, 637 F.2d 1159, 1167 (8th Cir. 1980).

[12]See Note 2, *supra*.

[13]*Compare,* the statement from a district court opinion quoted by the Minnesota court that the "advantage remains problematic and variable from election to election." Slip op. at 15 *quoting,* Clough v. Guzzi, 416 F.Supp. 1057, 1068 (D.Mass. 1976). Presumably this reference indicates that the disadvantage may not be substantial in ALL elections, but it certainly IS substantial when the election is close.

THE MINNESOTA INTERESTS POSITED AS "JUSTIFICATIONS" FOR THE BALLOT DESIGNATIONS ARE INSUFFICIENT TO LEGITIMIZE THE CHARACTER AND MAGNITUDE OF THE BURDEN ON VOTERS' FIRST AND FOURTEENTH AMENDMENT RIGHTS.

The Minnesota Supreme Court premised its ruling on several bases as justifications for the statutes infringement on the Minnesota voters' Fourteenth Amendment rights.[14] They

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[14]The Minnesota Court offered these justifications in an analysis of the statute against only an equal protection challenge applying a mere rational basis analysis. As discussed above, this standard in inappropriate where the statute is challenged on the basis of an infringement of a fundamental right.

Furthermore, Minnesota apparently failed altogether to consider the First Amendment associational right (as applicable to the states through the fourteenth amendment's due process clause). In relying on its decision in Gustafson v. Holm, Minnesota has missed the development by this Court of associational rights as applied to voting rights that were, at the time of Gustafson, often assumed to be political questions without constitutional protection by the courts. Since Baker v. Carr, 369 U.S. 186 (1962), however, this

are as follows:

a. The denotion of a judicial office on the ballot as the incumbent's seat "promotes and clarifies the distinction between the separate offices." Peterson v. Stafford, 490 N.W.2d at 424.

This ground fails as it tends to obscure the fact that the challenger in an election, and her supporters, have an equal right to the judicial seat. To promote and clarify a distinction by blurring the boundaries between candidate and office manifests unreasonable and irrational expectations of the voters

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Court has made it clear that Equal Protection of suspect categories of people is not the only specific constitutional provision safeguarding our republican form of government. See, Norman v. Reed, 116 L.Ed.2d 711, 723 note 8. The right of political association encompasses equal protection, but equal protection does not encompass all of the rights guaranteed for political association.

(ie. to sort out in their minds that which has been muddled by the legislature). The double impediment to a fair election of naming the seat for the incumbent and the fact that the incumbents name is therefore always listed first has the purpose and effect of influencing the voter "at the most crucial stage in the electorial process - the instant before the vote is cast...." Anderson v Martin, 375 U.S. 399, 84 S.Ct. at 456 (1964).

Less restrictive means were available to the legislature, including numbering the seats, much in the way legislative districts are numbered. Furthermore, legislatures in other states have not found it "necessary" to identify judicial offices by the name of the incumbent. But, "Minnesota has adopted its own middle-of-the-road (sic) approach

to judicial selection" Id., an approach which, under the usual circumstances, makes the result of "elections" a foregone conclusion.[15]

b. "[T]he overriding purpose has been to assure an able, independent and stable judiciary while at the same time requiring incumbent judges to submit to voter appraisal in an open election." Peterson v. Stafford, 490 N.W.2d at 424.

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[15]Although case law in the election context is not as fully developed as that for equal protection and political association, fundamental procedural and substantive due process as well as candidates' supporters' privileges and immunities may be impaired where the government slants the entire election process. Cf. United States v. Cruikshank, 92 U.S. 542 (1876).

The Guarantee Clause of the United States Constitution, if it contains any positive law at all, must surely guarantee some level of fairness in elections mandated by the people in their state constitutions. Further, implicit in the constitutional provisions dealing with elections is the understanding that those elections will be free from undue governmental influence.

Here the Minnesota Court is referring to "the state's important regulatory interests (which) are generally sufficient to justify reasonable, non-discriminatory restrictions" Anderson v. Celebrezze, 460 U.S. 780, 788 (1983). However, in Anderson this Court stated some predicates, normally presumed but absent here. The restrictions must be evenhanded and protect the integrity and reliability of the electorial process. Anderson v. Celebrezze, 460 U.S. at 788-89 Note 8, 75 L.Ed.2d 547, 553 Note 7b. These regulations are not evenhanded towards the voters, as they tend to promote the interests of only those voters supporting the incumbent. Therefore, they detract from the integrity and reliability of the electoral process.

"Accepting the legitimacy of the interest claimed would not, however, excuse the requirement's unconstitutional breadth." Norman v. Reed, 711 L.Ed.2d at 726. Even if the abstract goals of an able, independent and stable judiciary can indeed be classified as "precise interests" capable of justifying some lessor intrusion on constitutional rights, Anderson v. Celebrezze, at 460 U.S. at 789, they cannot justify the character and magnitude of the injury to Minnesota voters. Perpetuation in office does not by itself produce "able" government; an "independent" judiciary does not compel a sacrifice to the democracy the judiciary is intended to serve; and, free and fair elections have been selected in the Minnesota constitution to be of more compelling interest than "stable" judges, secure in

high state offices.

In no event can such a double designation be deemed "necessary" when other jurisdictions avoid it. Further, the limits on participation by a class of voters is "especially difficult for the State to justify." Anderson v. Celebrezze, 460 U.S. at 793 (voters supporting independent candidates unconstitutionally denied equal ballot treatment). The limits on a class amplify the burden on the state so that the abstract interests, even if compelling in other contexts, could not justify the interference even if they were more focused in application--the scheme is simply too uneven.[16]

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[16]It is no coincidence that the recent election of the first minority member ever of the Minnesota Supreme Court, The Honorable Alan C. Page, was not running against an incumbent, but for the seat of a retiring associate justice.

The latitude extended to states to provide for the method of elections must still exist within the basic framework of the Federal Constitution. Just as a vote may be rendered meaningless by gerrymandering, so too may its effect be diluted by voting cues placed on ballots under color of law.

c. "[T]he purpose of these two separate identifications is informational, not to give the incumbent an advantage...," Peterson v. Stafford, 490 N.W.2d at 423, and "to identify the candidate so that the voter will know whom he is voting for." Id, at 424 quoting Gustafson v. Holm, 232 Minn. at 126-27, 44 N.W.2d at 447.

The "information" conveyed is that the candidates are unequally qualified. The incumbent is impliedly more qualified by virtue of her judicial experience

(even if the challenger had previous judicial or other relevant experience, that information is not conveyed to the voters).[17] The very seat contested is *named* after the incumbent. No information other than existence is conveyed on behalf of the non-incumbent candidate.

In a recent case which challenged an election procedure where party affiliation designations were permitted, but independent candidates received no designation, the Sixth Circuit characterized the unfairness as akin to,

> [A]n unlabeled product on a shelf

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[17]Incumbency designations communicate "as a qualification for candidacy that fact of present judicial service." Peterson v. Stafford, 490 N.W.2d at 425. It should be noted that a non-incumbent candidate may have present judicial service as a trial court judge or a member of the Court of Appeals, however, that information is not conveyed to the voters on the ballot.

> next to brand name products in a supermarket. Consumers would not chose the unlabeled product, because they have been conditioned by advertising to perceive quality in brand name products. Similarly, the absence of a label for a candidate gives rise to mistrust and negative inferences. Rosen v. Brown, 970 F.2d 169, 172-73 (6th Cir. 1992).

Certainly, the Minnesota method is broader than necessary to achieve mere informational goals.

The applicable standard was clearly articulated when the Court examined the Illinois election system last term in Norman v. Reed, 502 U.S. ___, 112 S.CT. 698, 116 L.Ed.2d 711 (1992). In that case, Illinois required gathering 25,000 votes for a party to be eligible to place its candidates on the ballot in separate political subdivisions. This Court

declared that even if the state interest[18] were accepted as legitimate, Illinois had not chosen the requisite MOST NARROWLY TAILORED MEANS OF ADVANCING THE INTEREST...." Id. 116 L.Ed.2d at 726 (emphasis added).[19]

The Minnesota Supreme Court admits that the incumbency designation alone is "but one means" of informing the voter of the added qualification of current judicial experience. Peterson v. Stafford, 490 N.W.2d at 425. One other

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[18]The state interest asserted was "ensuring that the electoral support for new parties in a multidistrict political subdivision extends to every district." Norman v. Reed, ___ U.S. ___, ___, 116 L.Ed.2d 711, 726 (1992).

[19]Norman also appears to place a requirement on the state to supply the Court with justifications for its substantial burdens on the rights of voters. Norman, 116 L.Ed.2d at 726 ("Reed has adduced no justification for the disparity here"). This brief addresses each justification posited by Minnesota.

method would be to use the incumbent's name as a description of the office. The Minnesota legislature has also selected this method. Either method serves a greater master--persuading, influencing, and pressuring a voter with state endorsement. The use of both schemes is intrinsically broader than necessary. It requires "elusive logic to demonstrate a serious state interest" Norman v. Reed, 116 L.Ed.2d 711, 726) in communicating the fact not once but twice.[20] If some voters do not understand that the "Gardebring Seat" indicates that Justice Gardebring holds that judicial office,

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[20]The Rosen court noted the affidavit of an expert in marketing and communications who stated that generally accepted communications and advertising principles recognize "substantial prejudice" in permitting designations for party candidates but not for independents. Rosen v. Brown, 970 F.2d 169, 172 (6th Cir. 1992).

how much more information can be imparted to those voters by designating the Justice as the "incumbent"?

d. "[T]o allow the public to reflect favorably or unfavorably on a judge's competence in office while, at the same time, 'retain(ing) ultimate control of the judiciary in the hands of the voting public.'" Peterson v. Stafford, 490 N.W.2d at 423

The Minnesota Supreme Court proffers this justification by quoting the judicial Branch Committee Report, Minnesota Constitutional Study Commission (1972), despite the fact that the Judicial Branch Committee's recommendations for adoption of a "Missouri Plan" were not enacted.

This goal is the goal of all elections, save those elections where the incumbent does not seek re-election. The goal is best served by open and fair

elections. Minnesotans have decided this by ratifying a state constitution which requires "incumbent judges to submit to voter appraisal in an open election." Peterson v. Stafford, 490 N.W.2d at 424.[21] The incumbency designation alone slants an election more than it provides reflection at the instant a ballot is cast. Bestowing a property interest on the incumbent at the top of each ballot actually *detracts* from these two goals by taking some control from informed voters who may, upon unfavorable reflection, desire to oust an incumbent. The task is made more difficult where uninformed voters are tilted, by double ballot designations presented at the

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[21]The Minnesota court is evidently interpreting its state constitution which requires that judges "shall be elected by the voters from the area which they are to serve in the manner provided by law." Minn. Const. Art. VI, Sec. 7.

ultimate moment of decision, in favor of incumbents.

For example, if two percent of voters cast their ballots for the incumbent solely because of the improper influence in the polling place, the challenger in a two person race must the muster the 50% plus one votes out of only 98% of the voters. This means that challenger must obtain votes from more than 51.02% of those not swayed by the double designation. If 5% of the voters cast their ballots for incumbents due to the double designation, the challenger must have over 52.632% of the remaining 95% of votes cast.[22] Note also that

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[22]This burden is analogous to the burden on Illinois voters held unconstitutional in Illinois Elections Board v. Socialist Workers Party, 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979) and the increased signature requirements in subdivisions with separate districts in Norman v. Reed, 560 U.S.___, 112 S.Ct.

the Eighth Circuit has upheld a district court finding that "*at least* five (5) percent" differential results solely from listing the incumbent first. McLain v. Meier, 637 F.2d 1159, 1166 (8th Cir. 1980)(emphasis added). The non-arbitrary voting public thus has LESS control under the Minnesota scheme.

Finally, information about judicial candidates may be disseminated through more conventional political methods than by ballot manipulation.[23]

___, 116 L.Ed.2d 711 (1992).

[23]The Minnesota court believes the ethical constraints on judges prohibit fair dissemination of candidate information, and so the legislature has attempted to help the justices disseminate their qualification of judicial experience. Peterson v. Stafford, 490 N.W.2d at 425. However, the ethical constraints on judges also apply to judicial candidates, and the legislature has compensated only for the constraints on incumbents.

Canon 7 of the Code of Judicial

e. "[T]he explicit or implicit goal of the constitutional provisions and enabling legislation is the same--to create and maintain an independent judiciary, as free from political, economic and social pressure as possible to allow judges to decide cases without those influences." Peterson v. Stafford, 490 N.W.2d at 420.

Having stated this purpose, the Minnesota Supreme Court cites with much admiration The Federalist No. 78, praising permanency in office. Id. Although life-time appointments well serve the goal of independence in the federal judiciary, Minnesotans have selected an open election where ultimate control is purportedly vested in the hands of the voters. Circuitous methods of assuring judicial permanence under the guise of voter information are misguided at best and disingenuous at worst. The

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Conduct reads: "A.(1) A judge *or a candidate* for election to judicial office should not...."(emphasis added).

right of voters to have their candidate on a ballot will have no significance unless the ensuing election is meaningful. Or as Madison more cogently articulated it:

> If we avert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people. Annals of Congress. 3rd Congress (Nov. 27, 1794) 934.

However, without a measure of fairness, equality, and associational protection, the censorial power shifts to those who presently hold office.

The fact that some political economic and social pressure necessarily results from the existence of Minnesota's constitutionally mandated elections cannot justify slanting the process of those elections to alleviate those pressures as they effect incumbents. In this respect, judicial elections must

conform to the same levels of fairness as the elections for offices in the other branches. Escaping the political and social pressure of elections is an argument more suited to the robes of a king than to the robes of a judge.

Substantial impairment of fundamental voting, equal protection, and associational rights is not justified by the State's expounded logic. Even if the State's interests, articulated as abstract ideals, are held to be compelling, the method aimed at achieving those interests is far broader than necessary to achieve them.

CONCLUSION

The Minnesota statute fails to satisfy the minimum standards of the United States Constitution. The statute

substantially impairs fundamental rights without compelling justification. Further, its methods are broader than necessary to achieve the State's purported interests. Amicus therefore respectfully asks the Petition for Certioari be granted.

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